Supreme Court, U.S.
FILED

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No. (1)

# In The
# Supreme Court of the United States

DEBORAH L. FISHER,

*Petitioner*,

v.

HARRY VANLOVEREN, M.D.; BRADLEY MULLEN, M.D.; BRAD OSBORNE, M.D.; MAYFIELD NEUROLOGICAL INSTITUTE, INC.; THE GOOD SAMARITAN HOSPITAL,

*Respondents*.

*On Petition for Writ of Certiorari to the Court of Appeals First Appellate District of Ohio*

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

The petitioner challenged in State Court the constitutionality of allowing a case to pend for over eighteen years in the legal system; the unknowing waiver of a "trial by jury"; and the retroactive application of new case law to a deny a jury trial to a victim injured eighteen years earlier. Petitioner asserted as well that if a physician is going to claim a State immunity from suit, that the patient should be given notice of such relationship prior to receiving treatment. Finally, petitioner challenged the holding that respondeat superior requires actual knowledge by the master and the holding of Comer v. Risko which misstates the law of agency in that a plaintiff must procedurally suc both the master and servant before the master can be liable.

The questions presented are as follows:

1. Did the Ohio Supreme Court err in finding no due process was violated in allowing a case to pend for eighteen years before finally granting defendant's third motion for summary judgment?

2. Did the Ohio Supreme Court err by holding that a patient's constitutional right to a trial by jury was unknowingly waived where an attending surgeon at a private hospital utilizes a resident physician who is involved in a State university program (from another hospital) who later claims immunity as a State employee?

3. Did the Ohio Supreme Court err in allowing the lower courts to apply case law from 2005 to the

facts of this case which occurred in 1991 to deny petitioner's right to a jury trial of her factual issues?

4. Did the Ohio Supreme Court err in upholding the lower court's finding that *respondeat superior* requires actual knowledge by the master that the servant was negligent before the master can be liable?

5. Did the Ohio Supreme Court err in its ruling in *Comer v. Risko* holding that a plaintiff must sue both the master and servant before a master can be liable under *respondeat superior*, which is contrary to settled principles of agency law?

6. Did the Ohio Supreme Court and the lower courts err in denying petitioner her Constitutional due process right to a jury trial when the record demonstrates clear unresolved issues of material fact?

7. Did the Ohio Supreme Court and lower courts err in granting summary judgment to defendants when a physician creates an operative report only after being sued and almost two years after the surgery?

## LIST OF PARTIES TO THE PROCEEDING

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Petitioner: Deborah L. Fisher

Respondents: Harry VanLoveren, M.D.; Bradley Mullen, M.D.; Brad Osborne, M.D.; Mayfield Neurological Institute, Inc.; The Good Samaritan Hospital.

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## PETITION FOR WRIT OF CERTIORARI

Petitioner, Deborah L. Fisher, petitions for a writ of certiorari to review the judgment of the Court of Appeals First District of Ohio and the denial of jurisdiction of the Supreme Court of Ohio.

## OPINIONS BELOW

The Hamilton County Court of Common Pleas (Ohio) issued it decision on April 24, 1997 (Appendix 49a ["App."], infra,) granting summary judgment to defendants VanLoveren, M.D. and Osborne, M.D. and Mayfield Neurological Institute, Inc. The court denied the hospital's motion for summary judgment given Mullen's "agency relationship with Good Samaritan for the imposition of respondeat superior liability."

Defendant Bradley Mullen, M.D., personally raised the defense of state employee immunity and was found by the Ohio Court of Claims to be immune from suit in the Court of Common Pleas, individually.

After through the years denying several further motions for summary judgment by the hospital over the course of many years, (Appendix ["App."] 49a; 39a; 29a] the Hamilton County Court of Common Pleas (Ohio) entered an Order on March 1, 2007 [App. 19a], finally granted summary judgment to the remaining defendant, Good Samaritan Hospital relying upon a 2005 decision from the Ohio Supreme Court.

## JURISDICTION

The denial of jurisdiction by the Ohio Supreme Court was filed on January 28th, 2009 [App.57a]. This

petition is accordingly filed within the time allowed by law. Supreme Court Rule 13.1. Jurisdiction over the appeal is invoked pursuant to 28 U.S.C. §§1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS

*THE CONSTITUTION OF THE UNITED STATES, AMENDMENT V, PROVIDES IN PERTINENT PART:*

> No person shall be ... deprived of life, liberty, or property, without due process of law[.]

*THE CONSTITUTION OF THE UNITED STATES, AMENDMENT XIV, PROVIDES IN PERTINENT PART:*

> Section 1. ... No state shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**Ohio Revised Code § 9.86 Immunity of public officers and employees.**

> ..... no officer or employee shall be liable in any civil action that arises under the law of this state for damage or injury caused in the performance of his duties, unless the officer's or employee's actions were manifestly outside the scope of his employment or official responsibilities, or unless the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner.

Effective Date: 03-13-1980

**Ohio Revised Code Chapter 2743: Court of Claims Ohio Revised Code 2743: State waives immunity from liability.**

> (A)(1) The state hereby waives its immunity from liability, ... and consents to be sued, and have its liability determined, in the court of claims created in this chapter in accordance with the same rules of law applicable to suits between private parties....
>
> (2) If a claimant proves in the court of claims that an officer or employee, as defined in section 109.36 of the Revised Code, would have personal liability for the officer's or employee's acts or omissions but for the fact that the officer or employee has personal immunity under section 9.86 of the Revised Code, the state shall be held liable in the court of claims in any action that is timely filed pursuant to section 2743.16...

Effective Date: 09-26-2003; 03-31-2005; 01-13-2005

**Ohio Revised Code § 2743.03(C) (1):**

A civil action against the state shall be heard and determined by a single judge.

**Ohio Revised Code §2743.11**

"No claimant in the court shall be entitled to have his civil action against the state determined by a trial by jury."

## STATEMENT OF THE CASE

This is a medical negligence claim filed Dec. 17, 1991, against the neurosurgeon (VanLoveren) [and his corporation Mayfield Neurological, Inc.]; the neurosurgery resident (Mullen); general surgery resident (Osborne) and the hospital (Good Samaritan). Defendant neurosurgical-resident physician Mullen raised the issue of "immunity" by claiming he was an employee of the State as a medical resident in the University of Cincinnati medical school (a State owned institution). Plaintiff, therefore, had to file a collateral suit against the State of Ohio (Mullen's employer) which will respond to Mullen's liability in the Ohio Court of Claims . The Ohio Court of Claims held that Mullen, was a "state employee" and entitled personally to immunity on January 7, 1998, and stayed the case in that court until the common pleas trial court resolved the other non-State parties liabilities.

## MEDICAL AND LEGAL FACTUAL BASIS:

In 1990, Petitioner, Deborah Fisher was a 32-year-old woman engaged to be married and working in the security department at Procter & Gamble. She began experiencing progressive headaches over approximately a one year period. She sought treatment with defendant, Mayfield Neurological Institute, where she was seen and treated by defendant neurosurgeon, Dr. VanLoveren. She was diagnosed with a benign brain tumor (a craniopharyngioma). She was admitted to Good Samaritan Hospital (a private hospital) on 12/18/90 for drainage and removal of the tumor. On 12/20/90 surgery was performed by Defendant VanLoveren

assisted by neurosurgery resident Dr. Mullen, a first year resident.

Post-operatively Petitioner's condition deteriorated manifested by swelling within the brain (increased cranial pressure or "ICP") and resulting bradycardia (decreased heart rate) and ominous neurological signs (unequal pupils; body posturing). The failure to monitor Petitioner during this post-operative period was a critical error by defendants. Ominous signs began on December 21, 1990. However, by December 23-24, and particularly December 24, even the nursing staff was concerned. The medical records of December 24th show only the two residents there in the morning. Defendant VanLoveren claims he was there but there is no record of that. Defendant Mullen, the senior resident, left the hospital to be with family leaving first year resident defendant Osborne alone to monitor. Osborne made at least three phone calls to Mullen throughout the day, but Mullen never came back to the hospital. Although Osborne had the ability to call VanLoveren directly he did not. Eventually in the evening of the December 24, 1990, the nurse (Athenas) testified in her deposition that she threatened Osborne that if he did not call VanLoveren she would. Osborne finally called (about 11:00pm) and VanLoveren, who was about a 40 minute drive distance away, arrived about midnight and took immediate measures to reduce the brain swelling. By that time significant and permanent brain damage had occurred.

VanLoveren, the "attending," has admitted he has the ultimate medical responsibility for his patient. [VanLoveren Depo. p. 57, l. 17-20]. Since the attending physicians cannot be at the patient's bedside

at every moment, hospitals depend on resident physicians to watch and monitor patients in the attending's absence.

Throughout the depositions, it was defendants themselves who repeatedly used "we" and "team" in discussing the care rendered. The hierarchy was: attending physician (VanLoveren); senior resident (Mullen); and first year resident (Osborne).

Unfortunately plaintiff's condition was not closely monitored during the several days following surgery and she developed ICP and serious permanent brain damage. She now is unemployable and dependent for everyday living. Plaintiff's expert, Dr. Rutberg, testified that there were "signs" even as early as December 21st that should have alerted defendants of problems. [Rutberg depo. p. 66]

Defendants attempted to utilize the "team" defense in trying to get Dr. Rutberg to exonerate each individual. The defense attempted to sever each defendant, individually, from liability as joint tortfeasors, prompting Petitioner's expert neurosurgeon (Dr. Rutberg) to testify: "I am troubled by this because is a team approach." [Rutberg depo. p.80]. The whole of Dr. Rutberg's deposition testimony sets forth his opinion (consistent with the affidavits) that the physicians comprising the team caring for Ms. Fisher did not render the appropriate standard of care. In fact, when pressed by defense, Dr. Rutberg even expanded his affidavit opinion: "My cutoff still is the 23rd. I really think the 23rd, in the midst of everything else."

The most blatant error is the trial court's summary judgment in contradiction to direct evidence creating an issues of fact. Plaintiff's filed the affidavit (and deposition) of board-certified neurosurgeon, Dr. L. David Rutberg and the mirror affidavit of Dr. Barrish [T.d.97]. Both affidavits state:

¶ 5: In my opinion within a reasonable degree of medical probability, the physicians and nurses responsible for Ms. Fisher on December 24, 1990, failed to render to Ms. Fisher the appropriate standard care requisite under the circumstances on December 24, 1990.

¶ 6. Based upon her clinical presentation as documented in the medical records, she clearly showed signs and symptoms of neurological deterioration throughout the day on December 24, 1990.

¶ 7. In my opinion within a reasonable degree of medical probability, the failure to provide appropriate monitoring surveillance by Dr. Osborne and Dr. Mullen and nurse Tenover and the failure to take action upon the clinical signs and symptoms demonstrated by Ms. Fisher on December 24, 1990, caused serious neurological damage to Ms. Fisher.

¶ 8. It is further my opinion within a reasonable degree of medical probability that had the appropriate standard of care been rendered to Ms. Fisher on December 24, 1990, she probably would not have sustained the neurological damage which she did. Such damage is permanent in nature.

Defense attorney for Van Loveren asked at deposition:

Q: **Other than what is stated in the affidavits**, do you believe that the care provided by Dr. Van Loveren was within accepted medical standards?

A: Yes, sir. [p. 44]

* * * *** * * * **

Q: I think earlier you had stated that your opinions regarding the care provided by Dr. VanLoveren you had no other opinions as to the care provided by Dr. Van Loveren **other than what was stated in the affidavits**?

A: That's correct. [p.53]

Q: I see. So now it is your testimony that Dr. Van Loveren deviated from the standard of care by not pursuing it on the 22nd, since he was the attending physician?

A: Whoever was ultimately in charge should have had a CAT scan, in my opinion, yes. .... Dr. Mullen should have reported it to Dr. VanLoveren, and Dr. VanLoveren was in charge, yes. [p.63]

Near the end of the 3-1/2 hour deposition, Dr. Rutberg stated his view that if the deposition testimony of Nurse Athanas was part of the record (which it was with the court), then defendant Dr. Osborne, the first year resident, was negligent in not doing more because he should not have had to be coaxed to call Dr. VanLoveren. [p.81]. This was apparently ignored by the lower courts in granting summary judgment to Osborne and Good Samaritan Hospital.

Q: And again, so that there is no surprises at trial, if Dr. VanLoveren would testify that he

> was present at the hospital on the 24th and saw the CAT scan before noon on the 24th and reviewed it personally, do you have an opinion as to whether or not he deviated from the standard of care under what you see in the records from that point on?
>
> A: If he saw that CAT scan and he saw her deteriorating, then I think he shouldn't have waited until 12:00 midnight to put in the intraventricular catheter, so I would consider that a deviation, honestly. [p.82]

Defendant VanLoveren testified:

> A: On the 24th, in the morning, at least, the initial concern was about hydrocephalus, expansion of ventricles, so at least by midmorning, I looked at that scan myself. [VanLoveren depo. p.12, l. 15-21].

Dr. Rutberg did clearly express expert opinions against all three physician defendants. The trial court's grant of summary judgment in contradiction to such direct evidence blatantly disregards issues of fact.

Defendant VanLoveren, as attending physician, testified that he has the ultimate medical responsibility for his patient, Deborah Fisher. Defendant hospital and defendant physicians owe a duty to Ms. Fisher to have made a "complete and timely" medical record. The hospital did not comply with the Joint Commission on Accreditation of Hospitals standards or ORC 3701.74. Defendants' duty to make a timely and complete medical record is not only to protect the patient's medical well-being, but

also to protect the patient's legal rights (*Joint Commission on Accreditation of Hospitals Manual*).

The appellate court states as fact, "When Dr. Mullen refused to dictate the operative report, Dr. Van Loveren dictated the note himself." [App. 10a] giving the impression that it was done contemporaneously. In fact, there was a gap of nearly two years between the surgery and the dictation, a fact the appellate court simply ignored.

The record reflects Van Loveren knew Mullen did not dictate the Operative Report soon after surgery. The record includes depositions from the hospital medical records personnel who testified that because of the absence of a dictated report, deficiency notices were sent out threatening revocation of privileges. However, the hospital never followed through with their own policy to suspend privileges due to this omission. And the record shows than an Operative Report dictated by VanLoveren magically appeared in 1992, after suit was filed. Certainly the credibility and reliability of very detailed specific factual assertions created almost two years post surgery are questions of fact for a jury; and cannot be conclusive facts as a matter of law.

Summary judgment and the denial of a jury trial were clearly inappropriate on the state of this record. Nonetheless, the trial court granted summary judgment to physicians VanLoveren (and his corporation, Mayfield Neurological, Inc.) and Osborne. Dr. Mullen, asserting his personal "immunity" as a state employee, was dismissed from the suit, which then required plaintiff to bring suit in the Ohio Court of Claims against the State of Ohio

(which would be responsible for Mullen's negligence), but which deprived plaintiff of her right to trial by jury.

On May 21, 1997, the trial court denied summary judgment to the hospital finding that the plaintiffs' expert testimony "creates a *respondeat superior* liability issue as to Good Samaritan Hospital" [App. 46a]. On Feb. 13, 1998, the trial court denied the hospital's "supplemental" motion for summary judgment [App.39a]. On April 28, 1998, defendants VanLoveren and Mayfield were granted summary judgment. Plaintiff argued that to deny a jury trial when material issues of fact are present violate petitioner's Constitutional due process right to a jury trial citing and quoting *Anderson v. Liberty Lobby, Inc.* 106 S. Ct. 2505 (1986).

Three years later, on February 6, 2001, the trial court judge recused himself and the case was transferred to a new trial judge. Four years later, on August 12, 2005 the new judge denied another motion for summary judgment by the hospital. [App. 29a] And it was again denied on August 19, 2005. [App. 25a] Defendant hospital again moved for summary judgment on August 16, 2006, now arguing *Comer v. Risko,* 106 Ohio St.3d 185, 2005-Ohio-4559 (2005). The trial court finally granted said motion on March 1, 2007 (**16 years after filing**) relying upon the 2005 *Comer* case! [App. 19a]

An appeal was timely taken and seventeen (17) months later the appeals court affirmed, holding Petitioner "had no right to any trial...let alone a jury trial." [App. 18a].

Petitioner moved for review by the Ohio Supreme Court asserting that an eighteen (18) year wait for a judicial determination denies Due Process and that Ohio patients given medical care at a private hospital cannot be found to have unknowingly waived their constitutional right to a jury trial because of an undisclosed (to the patient) relationship between a resident member of the medical team and a residency program with a State school. [Propositions of law No. 1 through 10]. Petitioner also asserts that retroactive application of a new case to extinguish Petitioner's claim brought 15 years earlier denies due process; and that Ohio Revised Code Chapter 2743 is unconstitutional as applied in this instance to deny petitioner's Constitutional right to a trial by jury. The Ohio Supreme Court declined jurisdiction. [App. 57a]

## REASONS FOR GRANTING THE PETITION

This Petition seeks a review of the Ohio Supreme Court's allowing petitioner's fruitless eighteen year legal odyssey of petitioner's quest to have a jury determine her medical malpractice claim for severe brain damage. Does the United States Constitution assure the People due process of law or merely the illusion of justice?

Benjamin Franklin's satirical writing "*How to Make a Great Empire a Small One*" imparts advice to the King of England as to how to make over The Great British Empire into a small one:

> **"To confirm these impressions and strike them deeper, whenever the injured come to the capital with complaints of maladministration, oppression, or**

> **injustice, *punish such suitors* with *long delay, enormous expense and a final judgment in favor of the oppressor.* This will have an admirable effect every way. The trouble of future complaints will be prevented, and governors and judges will be encouraged to further acts of oppression and injustice; and then the people may become more disaffected, and at length desperate."**

Petitioner, Deborah Fisher, has suffered "long delays, enormous expense and a final judgment in favor of the oppressor." Here this young woman's brain was profoundly injured as a result of medical malpractice in 1990. The legal system to which she resorted for just determination of her claim, instead became yet another affliction to her over the course of eighteen years. After denying numerous summary judgment motions over the years, the lower court applied a 2005 Ohio Supreme Court decision made fifteen years after her injury 2005 (*Comer v. Risko,* 106 Ohio St.3d 185, 2005-Ohio-4559) to dismiss her case, and the Ohio Supreme Court ratified the application. This result is more than a shame, this entire legal odyssey is a disgraceful embarrassment to our basic justice system.

## JUSTICE DELAY – JUSTICE DENIED

Clause 40 of the Magna Carta reads: "To no one will we sell, to no one will we refuse or delay, right or justice." The United States Constitution descends in a direct line from the principles of the Magna Carta. But here in 2009, Petitioner is in her Nineteenth year of entrapment within the legal maze.

This case languished for ten (10) years before the first trial judge without ever getting so much as a trial date. The successor trial judge did nothing for three (3) more years, even after plaintiffs' counsel moved and begged the court to place the case on "active docket in April, 2004."

The Rules of Superintendence for Court of Ohio are to ensure the proper administration of the courts. Specifically, Ohio Rule of Superintendence Rule 40 requires a trial judge to review its docket every six months.

> "(A)(1) Each trial judge shall review, or cause to be reviewed, all cases assigned to the judge. Cases that have been on the docket for six months without any proceedings taken in the case, except cases awaiting trial assignment, shall be dismissed, after notice to counsel of record, for want of prosecution, unless good cause be shown to the contrary."

If this is not accomplished the county's administrative judge is to refer this "to the Court Statistical Reporting Section for reporting to the Chief Justice for corrective action." Obviously, these rules were not followed in this case and if so, to no avail.

An appeal was filed on March 29, 2007 and the Ohio appeals court rendered its 14-paged decision one year and five months later (August 15, 2008). The Ohio Supreme Court refused jurisdiction on January 28, 2009. Now to deny this lady her day in court based upon *Comer v. Risko* from 2005 is unconscionable and a true failure of the court system. This so far departs from the accepted and usual course of judicial

proceedings calls for this Court to grant Petitioner's writ to demonstrate that this delay and result is not acceptable legal due process in 2009 in the United States of America.

**RIGHT TO JURY TRIAL WAIVED WITHOUT KNOWLEDGE**

Any reasonable person would be shocked that a patient can go in for surgery at a "private" hospital as a "private patient" of a neurosurgeon and learn 16 years later that she has no Constitutional Right to her trial by jury to determine negligence and compensation involved in such hospitalization because the chief-resident claims he is a "State employee" because part of his residency of the State University's Medical School involved rotating through this private hospital. How can this happen in the United States? The labyrinth of medical care in this country is perplexing enough, the courts should not allow a patient to be nothing more than a pin-ball in the legal gamesmanship when injured by medical negligence. The anchor of our American justice system is our trial by jury. This Court, as the Guardian of our basic Constitutional right to jury trial, should be concerned that Petitioner can be unknowingly foreclosed from such a basic right under application of the scheme of Ohio laws.

The abridgement of our substantial constitutional right to a jury trial is clearly of public and great general interest and so far departs from the accepted and usual course of judicial proceedings that this Court should exercise its discretion to grant this Petition to continue to protect such a basic right.

Here the record is clear that the Petitioner entered the private hospital under the care and direction of her neurosurgeon (who has no State affiliation). Petitioner had no idea that any State employee would be involved in her care or treatment. This is buttressed by further affidavits of family members and a nurse visitor. At no time did any of the defendants inform Petitioner that any aspect of her care would be provided by an State employee. Therefore, how can Petitioner have been found to have waived her right to a jury trial in this instance?

On the issue of whether a party has validly waived its right to a jury trial, federal case law is clear that any such waiver must be clear and unequivocal. "'[T]he right of jury trial is fundamental, [and] courts [must] indulge every reasonable presumption against waiver.'" *Heyman v. Kline*, 456 F.2d 123, 129 (C.A.2, 1972), quoting *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937).".. A waiver requires "some express action by the party or his attorney which evidences his decision not to exercise the right [to trial by jury]." *Bowles v. Bennett*, 629 F.2d 1092, 1095 (C.A.5, 1980).

The courts of Ohio cannot abrogate a Citizen's Constitutional right to a jury trial via unknown and undisclosed legal/contractual relationships between hospitals and doctor. This Court in *Aetna Ins. Co. v. Kennedy* (1937), 301 U.S. 389, 393 reiterated:

> *"But, as the right of jury trial is fundamental, courts indulge every reasonable presumption against waiver."(Hodges v.. Easton*, 106 U.S. 408, 412, 1 S.Ct. 307; *Slocum v.. New York Life Ins. Co.*, 228 U.S. 364, 385, 33 S.Ct. 523, Ann.Cas.1914D, 1029; *Patton v.. United States*,

281 U.S. 276, 312, 50 S. Ct. 253, 263, 70 A.L.R. 263; *Dimick v.. Schiedt*, 293 U.S. 474, 486, 55 S.Ct. 296, 301, 95 A.L.R. 1150; *Foust v.. Munson S. S. Line,* 299 U.S. 77, 84, 57 S.Ct. 90).

This Court is the guardian of the basic fundamental rights of United States citizens. Every generation has its "Clarence Earl Gideon" (Gideon v. Wainwright, 372 U.S. 335 (1963). Here another ordinary citizen petitions this court to take this opportunity to inject faith in the system of justice in this United States and see that ordinary Citizens will be protected by this Court.

**OHIO COURT OF CLAIMS:**

Ohio created the Ohio Court of Claims to which may be an appropriate forum for those injured directly by those clearly in the employ of the State. However, to relegate a citizen to the Court of Claims with no right of trial by jury when there is no indication whatsoever that a State employee is involved, is a subterfuge which should not be countenanced by the courts. A patient who enters a private hospital under the care of a private physician has no reasonable expectation that they are waiving their Constitutional right to trial by jury because one of the residents may be involved in a State institution residency program (and immune from suit as a State employee).

Here the trial court exonerated the neurosurgeon (VanLoveren) even though it was uncontested and admitted that he as "attending physician" had the "ultimate medical responsibility" for the patient and any resident physician was working under the supervision and direction of VanLoveren. Nonetheless

the appellate court affirmed summary judgment because VanLoveren did not have actual knowledge of his residents' negligence until "late in the evening on December 24, 1990." [App.9a]

This decision completely ignores that the residents Defendant Dr. VanLoveren is supervising and is responsible for (Mullen and Osborne) had not done their job all day and failed to monitor plaintiff appropriately. The Ohio Courts ignore their own precedent on this point, that an attending physician is vicariously liable for the acts and/or omissions of residents who are under his direction caring for his patients. (*Baird v. Sickler*, 69 Ohio St.2d 652, 23 O.O. 3d 532, 433 N.E.2d 593 (1982); *Bell v. Mt. Sinai Med. Ctr.*, 95 Ohio App.3d 590, 643 N.E.2d 151 (1994); see also *Rouse v. Pitt Cty. Memorial Hospital*, 343 N.C. 186, 470 S.E.2d 44 (1996)).

Defendant hospital admitted in discovery responses that Dr. Mullen was supervised by Dr. VanLoveren. [T.d. 85, Ans. to Interrog. #16]. Petitioner was denied her right to have these facts determined by a jury.

## MISAPPLICATION OF PRINCIPLES OF *RESPONDEAT SUPERIOR*

Just as shocking is that the Ohio courts improperly added a requirement of "actual knowledge" by the master onto settled *respondeat superior* principles before allowing liability to be imposed on the master. This upends the entire doctrine.

This case is a perfect example of legislating from the bench; making new law and extending the law beyond its limits to reach a result. *Respondeat superior*

has never required "actual notice" by the master as an element. If so, the entire legal concept would almost never apply (except criminally). Here it was uncontested and admitted that Dr. VanLoveren, as attending physician, had the "ultimate medical responsibility" for the patient and any resident physician was working under the supervision and direction of VanLoveren. Nonetheless the appellate court affirmed summary judgment because:

> "VanLoveren was not made aware of any problems with Fisher until very late in the evening on December 24, 1990... and he arrived at the hospital within approximately 15 (sic 40) minutes ... and took appropriate measures...Consequently, Dr. Van Loveren was entitled to summary judgment." [App. 9a ¶ 33].

This effect of the decision below is to legally add "actual knowledge" by the master to impose liability -- something that is legally and logically contrary to all agency law.

Under this logic every truck company is off the hook if they do not have "actual knowledge" that their driver is presently running a red light. This legal novelty is purely "result oriented" and denies Petitioner her trial by jury as well as creates dangerous precedent.

## DENIAL OF DUE PROCESS WHEN MATERIAL ISSUES OF FACT WERE PRESENT

### A. INCOMPLETE MEDICAL RECORD – SUBSEQUENT CREATION

Our nation has recognized the importance of medical records and is currently undergoing the complete overhaul to electronic medical record keeping. The Ohio Legislature has repeatedly demonstrated the importance of medical records of its citizens (protecting the confidentiality; the costs, etc). In fact, the legislature now requires that "all medical records be reviewed" before even being permitted to file a medical negligence claim. (Civil Rule 10 (D)(2) Affidavit of merit; medical liability claim.) The defendants herein admit that the operative report is "an important part of the record" and would contain the "actual details of what occurred." However, these lower courts have trivialized medical records by granting summary judgment where records were missing until created during litigation. The operation herein was December 23, 1990. According to defendants themselves, an operative report is typically dictated immediately after surgery, none was s dictated. It was not until two years later (after suit was filed) that VanLoveren dictated a "detailed" operative report in 1992!

The appellate court here coyly omitted any mention of the 2 year delay:

> "Dr. VanLoveren testified that as soon as he learned that Dr. Mullen had not dictated the operative note, he contacted Dr. Mullen. When Dr. Mullen refused to dictate the operative

> report, Dr. VanLoveren dictated the note himself.....Dr. Rutberg (plaintiff's expert) further testified that the late preparation of the operative note had no causal relationship to any injury Fisher had suffered on December 24. Thus, based upon testimony from Fisher's own expert, the alleged malpractice on December 24 that had allegedly resulted in injury to Fisher and could not, therefore, have created an issue of fact related to Dr. VanLoveren. " [p.8 opinion.]

The appellate court ignored Ohio precedent *Moskovitz v. Mt. Sinai Med. Cntr*, 69 Ohio St.3d 638 (1994), which allows a cause of action for altering medical records. To hold as a matter of law that there can be no cause of action when a physician fails to fulfill his medical duty to complete the medical record and waits to "create" one 2 years later after suit is brought is illogical, but very dangerous precedent. Plaintiff's expert, Dr. Rutberg, testified that "There is no record. I don't think there is a reliable record." [Rutberg depo., p.36, l. 1-6]. When asked if it caused Ms. Fisher's injury, he said: "it didn't cause her injuries, no. It does interfere with knowing what exactly happened." [Rutberg depo. p. 49].

Both the defendant hospital and Defendant VanLoveren owe a duty to Ms. Fisher to have made a "complete and timely" medical record. The defendant hospital did not comply with the Joint Commission on Accreditation of Hospitals standards or Ohio Revised Code §3701.74. Defendants' duty to make a timely and complete medical record is not only to protect the patient's medical well-being, but also to protect the patient's legal rights (*Joint Commission on*

*Accreditation of Hospitals Manual*). The Ohio Supreme Court has recognized the Joint Commission on Accreditation of Health Organizations (JCAHO) as the standard for hospital operations. (*Albain v. Flowers Hospital,* 50 Ohio St. 3d 251, 256-7 (1990), citing *Jackson v. Power*, 743 P.2d 1376, 1383, fn.13 (1987)).

This "public policy" has been recognized by numerous other courts: *Sweet v. Sisters of Providence*, 881 P.2d 304 (1994) {"public policy that adequate operative notes be kept"}; *Public Health Trust v. Valcin*, 507 So.2d 596 (Fla. 1987) {where a physician fails to dictate an operative note a rebuttable presumption arises and shifts the burden to the party against whom the presumption operates to prove the nonexistence of the fact presumed; *Patrick v. Sedwick*, 391 P.2d 453 (Alaska, 1966) {"It is incumbent upon the physician to describe accurately and fully in the report of the operation everything of consequence which was done and which was observed; should be dictated immediately after the operation."} This Court should not permit a lower court to destroy that public trust and duty. The courts of Ohio should not facilitate a physician avoid responsibility by failing to complete a patient's medical record until it can be useful as a defense.

Under these circumstances, a reasonable person could conclude that an operative report was created after litigation in an attempt to destroy or alter evidence of malpractice (*Moskovitz v. Mt. Sinai, supra*). Here the lower courts have determined such conduct, as a matter of law, is not actionable which is clearly contrary to Ohio law and due process. The "causation" red-herring is ridiculous. Under what set of facts could one show that the missing medical record

"caused" the malpractice? If this is permitted to stand then it would be advantageous for a physician to avoid dictation in questionable cases and wait for the litigation. The tail wags the dog to absurdity. This is not a practice that should be supported by the courts of justice.

## B. AGENCY- DUAL AGENCY- BORROWED SERVANT – ISSUES OF FACT

The entire premise of the "residency" program is that the resident works under and "at the direction" of the attending physician. The court contradicts the record, which states:"Dr. Mullen was supervised by Dr. VanLoveren and the U.C. Neurosurgery Program. {Answers to Interrogs., filed 2/14/97 p.5}. VanLoveren admits this he as "attending" has the "ultimate medical responsibility for the patient. This court has specifically recognized the value of this tutorial process in *Theobald v. University of Cincinnati*, 111 Ohio St.3d 541, 2006-Ohio-6208 (2006). Defendant neurosurgeon VanLoveren admitted that he, as "attending physician," was the physician with the ultimate medical responsibility for the patient and Petitioner had expert testimony that he was negligent; nonetheless summary judgment was granted in his favor, thereby removing factual determinations from a jury.

A resident who is employed by the private hospital in which they are working, as well as being paid by the State can be a "dual agent" and there is still a basis for direct liability against the private hospital who has the "direction and control" over the resident. None of the courts herein responded to Petitioner's arguments of dual agency or borrow servant liability.

A servant directed or permitted by his master to perform services for another may become the servant of such other in performing the services. (*Restatement of the Law of Agency 2nd §227*).

Here resident Mullen was, while working at Good Samaritan hospital, subject to its rules and regulations. It was Good Samaritan who disciplined him for failure to complete their medical record and suspended his admitting privileges. If a hospital has the right of control and pays the resident, such is clearly is sufficient to impose direct liability. He is not an "apparent agent", he is an agent in fact and *Comer* should not apply to foreclose Petitioner's right to a trial by jury.

The courts below ignored Ohio's own Ohio Supreme Court precedent in *Halkias v. Wilkoff, Co.*, 141 O.S. 139, 47 N.E.2d 199 (1943) held:

> "Where one person lends his servant to another for a particular employment, the servant for anything done in that particular employment must be dealt with as the servant of the man to whom he is lent, although he remains the general servant of the person who lent him." (emphasis added)

This theory of "dual agency" although advanced below, was ignored by the lower courts. Other courts which have addressed this precise issue as to "residents" do not penalize the victim and allow the jury to make factual determinations as to agency. (at questions of agency are for the trier of fact and summary judgment is inappropriate. (See: *Kelley v. Rossi*, 481 A.2d 1340 (1985) (Supreme Judicial Court

of Massachusetts); *Smith v. Steinberg*, 481 N.E.2d 1344 (1985); *Shepard v. Sisters of Providence*, 89 Or. App. 59 (1988, Ct. App. Oregon). The record shows Mullen, as neurosurgery resident at Good Samaritan received paychecks from Good Samaritan and University of Cincinnati and was disciplined by Good Samaritan for failure to complete plaintiff's medical records.

This issue of "residency" physicians and immunity is a national issue and the private unknown contractual relationships between hospitals, residents and physicians should not be permitted to abrogate our basic right to a trial by jury in any State.

**RETROACTIVE APPLICATION OF NEW CASE LAW: AGENCY- DUAL AGENCY - BORROWED SERVANT – ISSUES FOR JURY**

While exonerating the neurosurgeon and the "lowly intern" (Osborne), the only defendant left in the trial court was Good Samaritan Hospital. Twice the trial court denied summary judgment to the hospital, holding:

> "However, since Rutberg's testimony does suggest a deviation on the part of Dr. Mullen, and since his employment status with Good Samaritan as chief neurological resident arguably creates an agency relationship with Good Samaritan for the imposition of respondeat superior liability, the defendants' motion is denied as it relates to Good Samaritan." [App. 55a]
>
> "First, there is a triable issue of fact as to the liability of Good Samaritan for the actions of Dr.

> Mullen. Despite the uncontested fact that Dr. Mullen was an employee, not of Good Samaritan, but of the State of Ohio, there remains an apparent agency between Dr. Mullen and Good Samaritan which his sufficient to overcome summary judgment. As it appeared to the plaintiff at the time of the incident in question that Dr. Mullen was an employee of Good Samaritan, and as Good Samaritan arguably had the right of control over and responsibility for Dr. Mullen's actions at that time, Good Samaritan may be vicariously liable for Dr. Mullen's potential malpractice." [App. 43a].

With Petitioner still awaiting a trial setting from the court, the Ohio Supreme Court issued its decision in *Comer v. Risko,* 106 Ohio St.3d 185, 2005-Ohio-4559 in 2005. Agency law in Ohio had been clear for over 70 years, e.g: "For the wrong of a servant acting within the scope of his authority, the plaintiff has a right of action against either the master or the servant, or against both, in separate actions, as a judgment against one is no bar to an action or judgment against the other until one judgment is satisfied." *Losito v. Kruse*, 136 Ohio St. 183, 16 O.O. 185, 24 N.E.2d 705 (1940). However, the *Comer* court held "that agency by estoppel is a derivative claim of vicarious liability whereby the liability of the hospital must flow through the independent-contractor physician. Consequently, there can be no viable claim for agency by estoppel if the statute of limitations against the independent-contractor physician has expired."

Here, even though the claim against Dr. Mullen in the Court of Claims relative to Dr. Mullen was timely

filed (the statute of limitations had not expired), the Ohio courts held "Dr. Mullen's liability was extinguished [by the Court of Claims]. As stated by the Ohio Supreme Court in *Comer,* "in the absence of the tortfeasor's primary liability, there is no liability that may flow through to the hospital on an agency theory." [Court of Common Pleas opinion, March 1, 2007, p.3] [App. 23a].

Clearly Dr. Mullen's personal immunity did not "extinguish" liability for his malpractice, since, as an alleged State employee, his liability was transferred to his employer, the State of Ohio, merely is substituted in his place. This contortion of caselaw 17 years after the fact denies Petitioner her right to a jury trial and leaves her only with an administrative "trial" by a single retired judge in the Ohio Court of Claims. Petitioner must be asking herself what country is she in. Where is her Constitutional right to have a jury determine this controversy in excess of twenty dollars? This is her brain that has been damaged, such deserves more due process than what has been put forward to her after 18 years.

To procedurally corral this victim into the Court of Claims based upon an unknown and undisclosed working arrangement with a State medical school and the private hospital is fundamentally unfair, borderline fraudulent, and a clear denial of due process. This is a recurrent issue, not only in Ohio, which needs this Court's attention and protection.

To let this stand as "justice" this Court will confirm by inaction that we are well on Franklin's road to making our great nation small. Petitioner trusts that the highest court of justice in the United States still is

responsive when the basic Constitutional right to trial by jury is at stake. Petitioner has only one brain to protect and only one system in which to seek justice.

## CONCLUSION

Therefore, and for all the foregoing reasons, Petitioner, Deborah L. Fisher respectfully requests that this Court issue a Writ of Certiorari to the Supreme Court of Ohio.

Respectfully submitted,

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By counsel

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